IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Writ Petition No.1393 of 2007

Amrut Babubhai Patel — Petitioner
Vs.
The Union Territory of Dadra
& Nagar Haveli, Silvassa & anr. — Respondents

Mr.Shirish Gupte, Sr.Counsel with Mr.Balkrishna Joshi for petitioner.

Mr.Raja Thakare for respondent no.1 - Union Territory.

Mr.S.V.Marvadi for intervenor.

Mr.D.P.Adsule, APP for State.

CORAM: B.H.MARLAPALLE, J.

August 13, 2007.

P.C.

. Heard Mr.Gupte, the learned Senior Counsel with Mr.Joshi for the petitioner who is accused no.3 in Sessions Case No.29 of 1997 presently pending for trial before the learned Sessions Judge, Dadra and Nagar Haveli at Silvassa. He made an application on or about 16/7/2007 in the said Sessions Case for recall of Prosecution Witness No.3 whose depositions were recorded at Exhibit 34 and this application was filed under Section 311 of Cr.P.C. No order has been passed on the said application except the endorsement "File". Hence this petition seeking directions to

the trial Court to recall PW 3 (Shri Bholenath son of Ramsharan Gupta) for further examination of the defence. Mr.Gupte has referred to the scheme of Section 311 of Cr.P.C. and by referring to the decision in the case of Rajendra Prasad Vs. The Narcotic Cell through its Officer in Charge, Delhi **[AIR 1999 SC 2292]** he submitted that an application under Section 311 of Cr.P.C. could be filed at any stage before the judgment is pronounced and if a case was made out by either of the party to the trial, the learned Judge is required to consider the said application and allow the witnesses to be recalled.

. Mr.Thakare, the learned counsel appearing for the prosecution i.e. the respondent no.1 has submitted that the concerned witness i.e. PW 3 was declared a hostile witness and, therefore, his testimony as recorded before the trial Court could not be termed to be a substantive evidence and, therefore, it was not necessary to recall the said witness. He also pointed out that the recording of evidence was closed sometimes in November 2006 and the final arguments were advanced by the Prosecutor as well as the defence lawyers between 13/6/2007 to 16/7/2007. The application under Section 311 of

Cr.P.C. was presented after the case was reserved for judgment on 16/7/2007. He further pointed out that PW 3 was in the witness box on 11/5/2000 and thereafter at no point of time during the last seven years or so such an application was made. He also submitted that the charge-sheet on the basis of which the application was moved under Section 311 of Cr.P.C. by accused no.3 was moved before the Magistrate's Court in another C.R. on 16/7/2007 and it pertained to an incident which had taken place on 28/4/1996 and, therefore, there was sufficient time available to the defence to apply for recall of the concerned witness rather than waiting for about six years or so.

. Mr.Marwadi, the learned counsel has appeared for the intervenor who filed Criminal Application No.239 of 2007 which has been allowed today. The said applicant is the original complainant and on the basis of the FIR registered by him in C.R.No.30 of 1996, it subsequently got converted into Sessions Case No.29 of 1996. Mr.Marwadi submitted that the application filed by the petitioner is one more attempt to delay the trial of the Sessions case and the application is filed mainly based on the

contentions that the incident in C.R.No.29 of 1996 had taken place on 29th April 1996. As per Mr.Marwadi there is a typographical mistake in the statement of Bholenath Ramsharan Gupta by police and instead of 28th April 1996 it has been inadvertently typed as 29th April 1996 and this typographical mistake is being used to delay the trial in the pending case, alleged Mr.Marwadi.

. There is no doubt that an application under Section 311 of Cr.P.C. can be filed at any stage before the final verdict is pronounced by the trial Court. The application has been filed by the present petitioner on 16/7/2007 admittedly on the day when the oral arguments were concluded and it is also stated that the parties have filed written arguments before the trial Court. It was necessary for the trial Court to pass an order on the application submitted by the petitioner on 16/7/2007 and it is the trial Court which will have an advantage in appreciating the facts as pointed out by the prosecution as well as by the complainant whether the statement of Bholenath Gupta recorded in C.R.No.29 of 1996 pertained to the incident that had taken place on 28/4/2007 or 29/4/2007 and this is a matter which

could be better appreciated by the trial Court as both the Courts below and the Court of the learned Judicial Magistrate, First Class as well as the learned Sessions Judge are located in the same premises. It would be, therefore, necessary for the learned Judge of the trial Court to pass an order on the said application submitted in Sessions Case No.29 of 1997 rather than just endorsing the same as "File". Mr.Marwadi also alleged that on the basis of this petition pending, the defence is seeking adjournments from time to time and as a result thereof the Sessions Court is not allowed to pronounce the judgment.

. Be that as it may, it is directed that the application submitted by the petitioner under Section 311 of Cr.P.C. on or about 16/7/2007 be decided as per law before the Trial Court proceeds to pronounce its order and preferably within a period of one week from today. Petition disposed off accordingly

(B.H.MARL